Supreme Court, U. S.
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80-855

No.

In the
Supreme Court of the United States
NOVEMBER TERM, 1980

JOHN ANTON,
Petitioner,
vs.
THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Scheffer Press, Inc.—(312) 263-6850

QUESTION PRESENTED

Whether or not the affidavit in support of the search warrant amounted to probable cause or mere suspicion of the affiant.

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IN THE

SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1980

No.

JOHN ANTON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner John Anton, by his attorney, respectfully prays that this Court issue a writ of certiorari to review the judgment and order of the Court of Appeals for the Seventh Circuit entered in this proceeding on July 29, 1980.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit was originally decided by an unreported order of July 29, 1980. The Court of Appeals subsequently decided to issue the decision as an opinion. A copy of said opinionis attached hereto as Appendix A.

JURISDICTION

Judgment of the Court of Appeals for the Seventh Circuit was originally entered on July 29, 1980. A timely petition for rehearing was filed on August 28, 1980, and denied on September 23, 1980. This petition for certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The petitioner has been indicted for alleged violations of Title 21, United States Code, Section 846 and Section 841(a)(1). A motion to quash search warrant and suppress evidence was made before the trial judge in the United States District Court for the Northern District of Illinois, Eastern Division, which said motion was sustained. The government appealed from this decision, and the United States Court of Appeals for the Seventh Circuit reversed.

Agents of the Drug Enforcement Administration (DEA) began conducting an investigation of the petitioner and Gregory C. Carlsen, a co-defendant, in June of 1979. DEA agents thereafter conducted surveillance of the two individuals and the residence of the petitioner for approximately three months.

During the surveillance of Anton and Carlsen, each was observed making purchases of various chemicals from two chemical supply companies. Anton purchased one chemical on three occasions and Carlsen purchased three different chemicals. Two of the chemicals purchased by Carlsen were purchased on three occasions, and one on only one occasion. The four chemicals purchased by the defendants were all sold without any legal restrictions on said sales. The defendant Anton always gave the chemical supply company his correct name and address, but the defendant Carlsen used a fictitious name and address.

In each instance, the chemicals purchased were taken to either the petitioner's residence or to the garage behind his apartment.

As a result of the surveillance of the petitioner's garage, a DEA agent also found an empty gallon can of acetone and an empty gallon can of alcohol in a garbage can behind the garage. Neither of the defendants had been observed purchasing either the acetone or alcohol.

Further, during the surveillance, DEA agents observed two boys cleaning the garage, at which time one boy was observed carrying two pails to the second floor of the garage, one of which appeared lighter than the other. At various other times, DEA agents were able to see inside part of the garage and observe the west wall there-

of, and on those occasions, they did not always see the same number of pails in the same place they were previously observed.

Lastly, the DEA agent who was the affiant in the affidavit for search warrant listed the chemicals known or suspected to have been purchased by Anton and Carlsen and says that said chemicals ". . . are commonly used in the manufacture of methylenedioxy amphetamine (hereinafter referred to as MDA), a Schedule 1 Controlled Substance. Moreover, on September 10, 1979, affiant was informed by DEA Forensic Chemist Ronald Waggenhoffer that all of the above described chemicals are used in the manufacture of MDA. Affiant was further advised by DEA Chemist Waggenhoffer that only one essential chemical in the manufacture of MDA is not included in the above-described chemicals. The missing chemical is piperonal. . . ."

A copy of the affidavit for search warrant is attached hereto as Exhibit B.

REASONS FOR GRANTING THE WRIT

1. The affidavit for search warrant did not contain facts sufficient to state probable cause.

As the government stated in its Brief On Appeal at page 7, "In the instant case DEA agents wanted to search the residence of the defendant John Anton, where they *suspected* MDA was being manufactured." (emphasis added)

It is clear and uncontroverted that the four chemicals purchased by the defendants were sold without legal restriction on their sale. Additionally, the empty containers of acetone and alcohol found in the garbage represent chemicals which can be purchased at most local hardware stores. It is also clear that the chemicals listed in the affidavit for search warrant have a wide variety of uses including common household uses. *United States* v. *Noreikus*, 481 F.2d 1177, (7th Cir. 1973).

The mere purchase of chemicals gave rise to the suspicion of the DEA agents, and that suspicion gave rise to a three month surveillance being conducted of the defendants and the residence of the defendant Anton. During the entire period of surveillance, no criminal activity was detected, and the agents had no more basis for their suspicion when they sought the search warrant than they had when the surveillance was started. The agents were aware early on in the surveillance operation that the defendant Carlsen used a fictitious name when he purchased chemicals.

At the hearing on the motion to suppress evidence, the DEA agent who was the affiant in the affidavit for

search warrant was asked, if he had any "other information which would lead you to a belief which would go beyond suspicion," that a controlled substance was being manufactured. His answer was "no." Tr. December 17, 1979, page 105.

During the surveillance conducted by the DEA, no direct evidence of illegal activity was observed. There was no tip from a reliable informer, no purchase of laboratory equipment, no one was observed mixing chemicals, there was no prior history of either defendant being involved with illegal drugs and there was no evidence of chemical odors emanating from the premises as seems to be common in most clandestine drug manufacturing cases. *United States* v. *Moore,* 562 F.2d 106 (1st Cir. 1977) *cert. denied,* 435 U.S. 926 (1978).

In the absence of any indication of criminal activity, the mere purchase of chemicals which have no restrictions as to their sale and which have a wide variety of uses does not give rise to probable cause. At best, it may arouse the suspicion of an agent as it did in this case. The failure of the surveillance operation to turn up hard evidence of criminal activity leaves the agent with his suspicions, but not with facts sufficient to create probable cause.

In the case of *United States* v. *Failla,* 343 F.Supp. 831 (1972), government agents conducted surveillance of an individual who had made a purchase of a certain chemical under a fictitious name. Surveillance of the defendant produced no evidence of criminal activity. The defendant's motion to suppress evidence was granted. At page 835, the court said,

> At best the purchase order and telephone call to agent Mihok were enough to arouse the suspicions of an alert agent, as they did.

In the case of *United States* v. *Noreikis,* 481 F.2d 1177, (7th Cir. 1973), there were two affidavits for the search warrant. The second affidavit in that case being similar to the affidavit in the instant case. In *Noreikis,* the court stated at page 1178,

> If the magistrate had relied only upon the second affidavit, the validity of the issuance of the warrant would have been questionable for three of the chemicals have substantial individual household uses—methanol, acetone and ethyl ether—and the fourth, lithium aluminum hydride, although it might be a "red flag" which would merit suspicion, would not necessarily estabilsh probable cause to believe illegal drugs were to be manufactured. United States v. Failla, 343 F.Supp. 831 (W.D.N.Y. 1972). Although the agents were aware that the various chemicals were being purchased in a surreptitious manner, for some reason this fact was not adverted to in the affidavit. Cf. United States v. Moore, 452 F.2d 569 (6th Cir. 1971).

2. The order of the Appellate Court was based upon inferences not properly drawn from the facts.

In its order, the Appellate Court stated at page 3 that an inference could be drawn that if chemicals are purchased at the same time, that they are being combined.

Such an inference cannot be drawn in this case, where the purchase of chemicals took place over a time period of approximately three months. Additionally, the government's witness stated that acetone would not usually be combined with the other chemicals mentioned in the affidavit for the search warrant. Tr. December 17, 1979, page 22.

The Appellate Court also stated in its Order at page 3, "when the possible combinations of these chemicals includes an end product which is an illegal substance, it is reasonable to infer that the manufacture of such a substance is taking place."

This statement is totally erroneous. It was not possible to manufacture a controlled substance with the chemicals alleged to be in the possession of the defendant. As was brought out at the hearing on the motion to suppress, and as the government's witness admitted, three chemicals were necessary to the manufacture of the controlled substance, and the defendant Anton only possessed one of them. Tr. December 18, 1979, pages 11 and 12. Not only was it impossible to manufacture a controlled substance from the chemicals known to be in the possession of the defendant Anton, there was testimony at the suppression hearing to the effect that a qualified chemist given a list of those chemicals could not reach a conclusion as to what was being done with those chemicals. Tr. December 17, 1979, page 57.

Lastly, the Appellate Court stated at page 3 of its Order, "the empty containers and movement of various chemical pails raise an inference that the chemicals were being used."

The above inference must be read in light of the fact that the only empty containers observed were found in the garbage can in the alley behind the defendant Anton's residence, and they were not chemicals which either defendant was known to have purchased.

With regard to the movement of pails, the only movement observed occurred when two boys were seen cleaning the garage behind Anton's residence, and one of them

carried two pails to the second floor of the garage. Other than that incident, the agents had seen the west wall of the garage on a few occasions, and did notice that the same containers were not always in the same place.

3. The Affidavit for Search Warrant did not contain any allegation that a significant number of the chemicals necessary to manufacture a controlled substance were in the possession of the defendants.

The only chemical alluded to in the Affidavit for Search Warrant which was said to be necessary to manufacture the controlled substance under consideration was piperonal, and there was no allegation in the Affidavit that piperonal was in the possession of either defendant or was within the premises to be searched. All of the chemicals listed on page 20 of the affidavit have a multitude of useful purposes other than the manufacture of a controlled substance. Tr. December 17, 1979, page 62. As has previously been stated, these chemicals are common solvents, and some of them have general household uses. In determining probable cause in a case of this nature, the critical element is whether or not a significant number of the *necessary* (emphasis added) ingredients to manufacture the controlled substance were observed. *United States* v. *Tasto*, 586 F.2d 1068 (1978).

4. A search warrant which is not based on probable cause does not make the search pursuant to that warrant legal.

It is a basic principal of our system of justice that arrests and searches with or without a warrant must be based upon more than mere suspicion. *Henry* v. *United States*, 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959). If proable cause to make an arrest or search does not

exist, it does not suddenly spring into existence solely as the result of the issuance of a warrant.

In this case, DEA agents suspected illegal activity primarily because of the purchase of certain chemicals. As has previously been stated, purchase or possession of the listed chemicals either singly or together did not constitute an illegal act. The DEA agent himself stated that he had nothing more than a suspicion of criminal activity. It was further brought out at the suppression hearing that the defendants were not in possession of a significant number of the ingredients *necessary* (emphasis added) to manufacture a controlled substance; and that a controlled substance could not have been manufactured with the chemicals known to be in the possession of the defendants. As the court stated in *United States* v. *Failla*, 343 F.Supp. 831 (1972) at page 835,

> Indeed the facts known to the agent may be in part little more than observation of a series of apparently innocent and lawful acts. Standing alone, these observations would not be enough but, if they served to corroborate the details of an informant's tip, the innocent acts may take on a crucial probative force in finding probable cause.

In this case, neither defendant did any act which could be considered illegal. To the contrary, there was a total absence of illegal activity, which should have been an exonerating factor, rather than viewing the completely legal acts of the defendants as incriminating factors. As the court in the *Failla* case *supra* observed, the purchase of a chemical commonly used in the manufacture of illegal drugs may be suspicious, but in the absence of an observation that the defendant was making or selling drugs, there is no showing of probable cause.

5. Existing case law applied to the facts of this case lead to the conclusion that probable cause did not exist for the issuance of the search warrant.

It is submitted that the decisions rendered in the *Failla* and *Noreikis* cases cited herein are controlling of the issue presented in this case.

In both cases there were purchases of chemicals which gave rise to suspicion by a government agent. In neither case was there any direct evidence of criminal activity. The court in the *Failla* case suppressed the evidence sought to be introduced. Although *Failla* did not involve a search warrant, the decision dealt with the issue of probable cause which has been noted is the same whether the case involves a search pursuant to a warrant or a non-warrant situation. In the *Noreikis* case, the court stated that the affidavit which was similar to the affidavit in this case would not have been sufficient to establish probable cause.

CONCLUSION

For each of the foregoing reasons, petitioner prays that his petition for certiorari to the Court of Appeals for the Seventh Circuit be granted and that the Court reverse the judgment entered below.

Respectfully submitted,

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Attorney for Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES
NOVEMBER 1980

Misc. No. .....

JOHN ANTON,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

It is hereby certified that service of this Petitioner's Petition for Writ of Certiorari to the Court of Appeals for the Seventh Circuit has been made on opposing counsel by mailing two copies thereof on this 21st day of November 1980, in an envelope properly addressed as follows:

JULIAN SOLOTOROVSKY
Assistant United States Attorney
219 S. Dearborn St.
Chicago, IL

.....
BURTON A. GROSS

BURTON A. GROSS
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Chicago, IL 60603
641-5898

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 80-1073

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JOHN ANTON and GREGORY CARLSEN,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 79 CR 534—JOHN POWERS CROWLEY, *Judge.*

ARGUED JUNE 13, 1980—DECIDED JULY 29, 1980*

Before FAIRCHILD, *Chief Judge,* WOOD, *Circuit Judge,* and LARSON, *Senior District Judge.***

LARSON, *Senior District Judge.* Defendant Anton's house was under surveillance as a potential illegal chemical laboratory. Drug Enforcement Agency officers presented an affidavit to a magistrate to establish probable cause for a search warrant. The magistrate found probable cause and issued the warrant. After the search of the house turned up quantities of MDA, a Schedule I controlled substance, Anton and his co-defendant Carlsen were arrested and charged with manufacturing an illegal drug. Anton made a pretrial motion to suppress the evidence gathered when the search warrant was executed. This motion was granted by the district court and the government appealed. We reverse.

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* This appeal was originally decided by unreported order on July 29, 1980. See Circuit Rule 35. The Court has subsequently decided to issue the decision as an opinion.

** Senior District Judge Earl R. Larson, United States Senior District Judge for the District of Minnesota, sitting by designation.

The affiant here had been a Drug Enforcement Agent for over eight years, and had specialized in investigating clandestine drug laboratories for four years. The affidavit stated that agents had been conducting surveillance at Anton's house for about three months. During that time large amounts of chemicals were purchased and brought to the house. On some occasions the chemicals were bought under a fictitious name. The agents at times observed chemical containers being removed from the garage into the house, and the number of receptacles in the garage changed from time to time. Empty chemical containers were found in the trash. The affiant agent stated that in his experience the chemicals observed being taken to Anton's house could be used to manufacture MDA. An agency chemist was shown the list of chemicals and confirmed that they could be used to make MDA. The chemist also told the agents that only one essential chemical for the manufacture of MDA was not included in the list.[1] Finally, the agent stated that no legitimate commercial or industrial activity appeared to be occurring at the residence.

Probable cause exists when it is reasonably believed that the evidence sought will aid in a particular apprehension or conviction for a particular offense and that the evidence is located in the place to be searched. Probable cause denotes more than mere suspicion, but does not require certainty. It might be said to exist if it is more likely than not that evidence of the illegal activity will be found on the premises to be searched. The agents believed probable cause existed and they submitted the facts supporting their belief to the required neutral magistrate. The magistrate agreed with the agents and issued the warrant. The magistrate's determination is entitled to some deference from a reviewing court. *See Spinelli* v. *United States,* 393 U.S. 410, 419 (1969). In addition, because of the preference for warrants, a lesser showing may establish probable cause

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[1] Apparently this statement by the chemist is erroneous as there are two more chemicals which are necessary to make MDA. The district court found that this misstatement was unintentional.

when a warrant is obtained than when a warrantless search is made. *See United States* v. *Ventresca,* 380 U.S. 102, 105-06 (1965); *Aguilar* v. *Texas,* 378 U.S. 108, 111 (1964); *Jones* v. *United States,* 362 U.S. 257, 270 (1960).

A number of cases have been reported involving probable cause for a "drug laboratory" search. The district court relied on *United States* v. *Failla,* 343 F.Supp. 831 (W.D. N.Y. 1972). That case involved a search pursuant to a warrantless arrest. The facts in that case are not comparable to the situation here. This Circuit has unheld search warrants based on similar facts in *United States* v. *Smith,* 499 F.2d 251 (7th Cir. 1974), and *United States* v. *Noreikis,* 481 F.2d 1177 (7th Cir. 1973), *cert. denied,* 415 U.S. 904 (1974) (certiorari granted as to other defendants on another issue).

Here, large quantities of chemicals were being purchased, sometimes under a false name. Although some or all of these chemicals may have household uses, when several are bought at the same time a strong inference arises that they are being combined. When the possible combinations of these chemicals includes an end product which is an illegal substance, it is reasonable to infer that manufacture of such a substance is taking place. The empty containers and movement of various chemical pails raise an inference that the chemicals were being used. The fact that no legitimate business use of such large quantities of chemicals appeared to be taking place at Anton's residence further buttresses the probability that an illegal use was occurring. Probable cause did exist for the search and the district court wrongfully ordered the products of that search suppressed. The Order of the district court is therefore reversed.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

AFFIDAVIT

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

LANCE O. MROCK being duly sworn on oath deposes and states as follows:

1. Affiant has been a Special Agent of the Drug Enforcement Administration (DEA) for approximately 8½ years. For the past 4 years, affiant has been employed in the investigation of, *inter alia,* clandestine laboratories used for the production of illicit drugs and, over this period, affiant has participated in searches and seizures of approximately 15 such laboratories.

2. Affiant has spent numerous hours between June 15, 1979 and September 9, 1979, conducting surveillance at the residence located at 2024 West Pierce Street, Chicago, Illinois. During this time, affiant has had an opportunity to view a Chicago Police Department photograph of John Anton and has been able to identify Anton as residing at this address. Affiant has inquired of the Commonwealth Edison Company, Illinois Bell Telephone Company, the Postal Service, and the Illinois Secretary of State. The inquiries have revealed that electric power at 2024 West Pierce is listed in Anton's name, the only telephone installed at 2024 West Pierce is listed to Anton, mail is addressed to Anton at this address, and a bronze Dodge van (1979 Illinois License Number 76743 RV) is listed to Anton at the above address. In addition, a white over brown 1972 Mustang (1979 Illinois License Number JA 2027) is registered to Anton at 2024 West Pierce Street, Chicago, Illinois.

3. Affiant was advised on June 15, 1979, by DEA Agent William Morley that on June 15, 1979 a representative of A. Daigger Chemical Company, 159 Kinzie,

Chicago, Illinois contacted Group Supervisor Stephen K. Bushendorf with information that a person identifying himself as John Anton was to claim five gallons of nitroethane later that morning at the company. Anton had provided A. Daigger Chemical Company with telephone number (312) 486-8353. Agent Morley personally learned from Illinois Bell Telephone Company that this number was and is subscribed to by John Anton, 2024 West Pierce, Chicago, Illinois.

4. Affiant was further advised by Agent Morley on June 15, 1979, that on June 15, 1979 Agent Morley participated in surveillance of Anton as he claimed the nitroethane at A. Daigger Chemical Company and transported the five gallon pail to his residence at 2024 West Pierce, Chicago, Illinois. Anton utilized the bronze Dodge van referenced in paragraph 2 above.

5. Affiant was advised by DEA Agent Richard Kazmar on June 21, 1979 that on June 21, 1979 a representative of Sargent-Welch Scientific Company, 7300 North Linder, Skokie, Illinois, advised Agent Richard Kazmar that a person representing New Image Academy, 3037 North Lincoln, Chicago, Illinois ordered 15 gallons of ethyl ether.

6. Affiant was advised on June 25, 1979 by Agent Richard Kazmer that on June 25, 1979 surveillance was conducted at Sargent-Welch Scienfitic Company, as a person subsequently identified as Gregory Carlson and an unidentified subject claimed fifteen gallons (three pails) of ethyl ether (described in paragraph 5 above) for New Image Academy. Surveillance was maintained as Carlsen delivered the three pails of ether to the garage at the rear of 2024 West Pierce, Chicago, Illinois. The man referred to as Gregory Carlsen, above, was positively identified as Gregory Carlsen by affiant from a Chicago Police Department photograph and other identifying information provided by the Chicago Police Department.

7. Affiant was advised by Agent Morley on or about July 25, 1979 that observation of the building at 3037

North Lincoln, Chicago, Illinois which inquiry revealed no presence of New Image Academy. Affiant, on August 1, 1979, inquired of the office of the Secretary of State Corporate Department, Springfield, Illinois revealed that there was a New Image Academy of Beauty Culture, Inc., at 3037 North Lincoln, Chicago, Illinois. The registered agent of this corporation was Gregory W. Carlsen. The official records fo the Illinois Secretary of State showed that New Image Academy was incorporated on January 1, 1965 and dissolved on January 17, 1974. The president was listed as Tillie A. Carlsen.

8. Affiant was advised by Agent Morley on June 31, 1979, that in addition to the fifteen gallons of ethyl ether ordered by New Image Academy on June 31, 1979, the representative of Sargent-Welch Scientific Company provided Agent Morley with copies of invoices listing previous orders by persons representing New Image Academy. The orders beginning in January, 1978 totaled 40 gallons of ethyl ether anhydrous, 80 pounds of ethyl ether, 35 gallons of tetrahydrofuran, 260 pounds of glacial acetic acid and 25 pounds of ammonium acetate. Affiant was further advised by Agent Morley that the subject placing the orders identified himself as Carl Blotts and left call back number (312) 637-8498 which number Agent Morley learned from Illinois Bell Telephone Company is subscribed to by Gregory Carlsen, 4629 West McLean, Chicago, Illinois. The Sargent-Welch representative advised affiant that all orders by Blotts were made over the telephone and picked up by, and paid for in cash by, the same man, subsequently identified by affiant as Gregory Carlsen.

9. Affiant was advised by Agent Morley on July 25, 1979 that on July 25, 1979, surveillance was conducted by Agent Morley and other DEA agents as Anton claimed a five gallon pail of nitroethane from A. Daigger Chemical Company, 159 West Kinzie, Chicago, Illinois, and delivered the chemical to the garage which is located at the rear of his residence at 2024 West Pierce, Chicago, Illinois. Anton utilized the previously referred to Dodge van to transport the chemical.

10. Affiant states that on July 26, 1979, surveillance was conducted by affiant and other DEA agents as Gregory Carlsen, representing New Image Academy, claimed five gallons of tetrahydrofuran and 60 pounds of glacial acetic acid from Sargent-Welch Chemical Company, 7300 North Linder, Skokie, Illinois. Affiant states that the chemicals were subsequently delivered to the garage at the rear of 2024 West Pierce where Carlson unloaded the chemicals assisted by Anton.

11. Affiant was advised by Agent Richard Kazmar on August 2, 1979 that on August 2, 1979, surveillance was conducted by Agent Kazmar and other DEA agents as Carlsen, representing New Image Academy, claimed an order of ten gallons of ether from Sargent-Welch Scientific Company, 7300 North Linder, Skokie, Illinois. Surveillance was maintained and affiant observed Carlsen deliver the chemical to Anton at the rear of the garage at 2024 West Pierce, Chicago, Illinois. Affiant states that both five gallon cans were placed in the garage by Anton and Carlsen. Later that day, the trash behind the residence at 2024 West Pierce was examined by affiant and the invoice from Sargent-Welch Scientific Company listing the ten gallons of ether was retrieved by affiant.

12. On August 13, 1979, affiant assisted in surveillance with other DEA agents as Anton claimed an order of ten gallons of nitroethane from A. Daigger Chemical Company, 159 West Kinzie, Chicago, Illinois, and delivered the chemical to the garage behind his residence at 2024 West Pierce. Anton utilized his previously mentioned Dodge van.

13. On August 14, 1979, affiant assisted in surveillance as Carlsen, representing New Image Academy, claimed an order of twelve pints of tetrahydrofuran from Sargent-Welch Scientific Company, 7300 North Linder, Chicago, Illinois. Surveillance was continued and affiant was advised by Agent Arthur Tahauri that Carlsen delivered the chemical to the front door of the residence at 2024 West Pierce, Chicago.

14. Affiant was advised on August 21, 1979, by DEA Agent Robert Upchurch that on August 21, 1979 during the course of surveillance at the rear of 2024 West Pierce, Agent Upchurch observed two unidentified youths cleaning out the garage. The youths had both doors opened and Agent Upchurch observed a number of five gallon pails along the west wall of the inside of the garage. At one point, Agent Upchurch observed one of the youths carry the pails up a stairway apparently leading to the second floor of the garage. By the way the youth carried the pails, one of the pails was obviously much lighter than the others and appeared to be empty. This particular pail was green and had markings identical to the green nitroethane pails purchased at A. Daigger Chemical Company, 159 West Kinzie, Chicago, Illinois by Anton.

15. Affiant was further advised by Agent Upchurch that later on in the day, Agent Upchurch observed the second youth sweep out the floor of the garage and place the sweepings in a brown box. This box was then placed in the trash by the youth. The box was subsequently retrieved and found to be marked, in part, "nitroethane, IMC Chemical Group Des Plaines." Affiant was advised by Agent Morley on August 21, 1979, that subsequent inquiry with IMC Chemical Group, a chemical wholesaler at 666 Garland, Des Plaines, Illinois, indicated that the box was part of two ten gallon shipments to A. Daigger Chemical Company, 159 West Kinzie, Chicago, Illinois sent by IMC Chemical Group on June 12, 1979 and July 27, 1979.

16. Affiant was advised on August 31, 1979 by Agent Morley that on August 31, 1979, surveillance was conducted by Agent Morley and other DEA agents, as Carlsen, representing New Image Academy, claimed an order of five gallons of ether in a light blue pail and ten gallons of tetrahydrofuran in two dark blue pails from Sargent-Welch Scientific Company, 7300 North Linder, Chicago, Illinois. Surveillance was continued as Carlsen delivered the chemicals to the garage behind 2024 West Pierce where he was met by Anton. Both subjects placed the three five gallon pails along the inside west wall of the garage.

17. Affiant was advised on September 5, 1979 by Agent Morley that on September 5, 1979 Agent Morley observed only two pails on the west inside wall of the garage at the rear of 2024 West Pierce, Chicago, Illinois, one light blue pail and one dark blue pail.

18. Affiant states that on September 3, 1979, while examining the trash behind 2024 West Pierce, Chicago, Illinois, affiant retrieved an empty gallon can of acetone and an empty gallon can of alcohol.

19. Affiant was advised by Special Agent Tahauri on September 11, 1979 that on September 11, 1979, Agent Tahauri observed only one pail along the inside west wall of the garage at the rear of 2024 West Pierce, Chicago, Illinois. This pail was dark blue and was clearly marked "Tetrahydrofuran."

20. As a result of his experience in investigating clandestine laboratories, affiant is aware that the above-described chemicals to wit:

a. Nitroethane
b. Ethyl Ether
c. Tetrahydrofuran
d. Glacial Acetic Acid
e. Ammonium Acetate
f. Alcohol
g. Acetone

are commonly used in the manufacture of Methylenedioxy Amphetamine (hereinafter referred to as MDA), a Schedule I Controlled Substance. Moreover, on September 10, 1979, affiant was informed by DEA Forensic Chemist Ronald Waggenhoffer that all of the above-described chemicals are used in the manufacture of MDA. Affiant was further advised by DEA Chemist Waggenhoffer that only one essential chemical in the manfacture of MDA

is not included in the above-described chemicals. The missing chemical is Piperonal, which is available commercially without legal restriction. Affiant is further advised by DEA Chemist Waggenhofer that nitroethane, tetrahydrofuran, glacial acetic acid, and ether used either singly or in combination with each other have no general household uses.

21. Affiant has personally conducted over 100 hours of surveillance of Anton's residence and garage. During these hours of surveillance, affiant has observed no activity indicating that a legitimate retail, commercial, or manufacturing establishment is being operated there. Affiant has further observed that the number of containers of chemical stored in the garage since June, 1979 to the present has continuously changed.

.....

LANCE O. MROCK
Special Agent
Drug Enforcement Administration

SUBSCRIBED and SWORN to before me
on this 12th day of September, 1979.

.....

JACK COOLEY
United States Magistrate

APPENDIX C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 23, 1980

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. EARL R. LARSON, Senior District Judge*

No. 80-1073

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

JOHN ANTON AND GREGORY CARLSEN,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 79 CR 534
JOHN POWERS CROWLEY, Judge.

ORDER

Treating the "Petition for Rehearing *In Banc*" as a petition for rehearing under Rule 40, F.R.A.P., the members of the original panel having voted to DENY,

Treating the petition as a suggestion for rehearing *in banc* under Rule 35, F.R.A.P., no judge in regular, active service having requested a vote thereon,

Accordingly, IT IS ORDERED that the petition for rehearing *in banc* is hereby DENIED.

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* Senior District Judge Earl R. Larson of the District of Minnesota is sitting by designation.